

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A

JUDGE, No. 04-239,

JUDGE RICHARD H. ALBRITTON, JR.

Florida Supreme Court

Case No. SC05-851

_____/

MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO COMPEL

COMES NOW the undersigned, as Special Counsel to the Judicial Qualifications Commission ("JQC") and responds to Honorable Richard H. Albritton, Jr.'s motion as follows:

I. INTRODUCTION

On July 28, 2005, Respondent's counsel, Scott K. Tozian, Esquire, filed a demand with JQC's undersigned Special Counsel, David T. Knight, Esquire, for Rule 12(b) Materials. On August 19, 2005 Special Counsel responded to respondent's request and furnished respondent with all documents to which respondent is entitled under Rule 12(b). Thereafter, respondent's counsel contacted the undersigned and requested additional materials. The undersigned responded to respondent's counsel's request and informed him that the additional documents in the undersigned's possession are not subject to discovery under Rule 12(b) and, furthermore, that such documents are work product prepared in anticipation of litigation and as such are privileged.

In his motion, Judge Albritton argues that typed summaries of witness interviews conducted by investigators hired by the JQC are witness "statements" and must be produced to

respondent pursuant to Florida Judicial Qualifications Commission Rule 12(b). This argument is without merit. The JQC has fully complied with Florida Judicial Qualifications Commission Rule 12(b) and has produced all actual witness statements used in the determination of probable cause. Judge Albritton's motion should be denied in total.

II. ARGUMENT

Judge Albritton is correct in arguing that his entitlement to all witness **statements** used to find probable cause is well established and the JQC does not dispute that. Accordingly, the JQC has fully complied with all of its obligations under Florida Judicial Qualifications Commission Rule 12(b) and has faithfully produced all statements. However, Judge Albritton is incorrect in asserting that the documents that are the subject of his motion to compel are witness statements and his Motion overstates the holding of the Supreme Court's ruling in the JQC proceeding against Cynthia A. Holloway, *Inquiry Concerning a Judge, Cynthia A. Holloway*, No. 00-143, Supreme Court Case No. SC00-2226.

Contrary to the argument advanced by Judge Albritton in his motion, the order in *Holloway* conforms to the argument advanced by the JQC in that case and here. The Supreme Court's order was narrowly crafted and granted Judge Holloway's motion to compel "only as to the **statements** used in determining probable cause." (*See* Order of the Supreme Court, dated February 22, 2001, attached as Exhibit A) (emphasis added). Judge Albritton's motion overlooks the fact that nowhere in the Holloway case did the Supreme Court define the term "statement." Respondent's motion merely quotes from the Supreme Court's order without providing any indication as to what documents the JQC produced in complying with the order.¹

¹ Respondent also argues that he needs access to the typed witness summaries in order to adequately prepare for the JQC's deposition. However, it should be noted that, the JQC has provided the names for which there are witness interview summaries and the respondent has indicated his interest in scheduling all of those witnesses' depositions.

The typed witness interview summaries requested by Judge Albritton are not statements, as that term is defined by the Florida Rules of Civil Procedure. Rule 12(a) of the Florida Judicial Qualifications Commission Rules provides that “[i]n all proceedings before the Hearing Panel, the Florida Rules of Civil Procedure shall be applicable except where inappropriate or as otherwise provided by these rules.” Because the Florida Judicial Qualifications Commission Rules do not define the meaning of the term “statement,” reference to the Florida Rules of Civil Procedure is the appropriate way to give further meaning to the undefined term.

Rule 1.280 (b)(3) of the Florida Rules of Civil Procedure defines a statement as “a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording or transcription of it that is substantially verbatim recital of an oral statement by the person making **and contemporaneously recorded.**” (Emphasis added). This rule clearly limits the definition of a statement to either a written document signed by the person to whom it is attributed or a simultaneous transcription of that person’s verbal statement or statements, such as a transcript prepared by a court reporter or stenographer. The documents that are the subject of Judge Albritton’s request are obviously not “written statement[s] signed ... by the person making [them].” Therefore, Judge Albritton is asserting that the typed witness interview summaries prepared by the JQC’s investigator are substantially similar to a deposition or court transcript. This argument is wholly unpersuasive. Not only were the typed summaries not “contemporaneously recorded,” as required by Rule 1.280(b)(3), but they also are not “substantially verbatim recital[s]” of the oral statements made by the witnesses. The summaries were prepared hours or even days later by the JQC’s investigator and consist of a mixture of both the investigator’s impression of the witnesses’

Therefore, respondent will be able to obtain the benefit of their testimony without being also given the benefit of the JQC’s work product.

words and the Investigator's thoughts and mental impressions. (See Affidavit of Robert W. Butler). Documents of this character do not meet the definition of "statement" contained in Rule 1.280(b)(3) and are also work product protected from disclosure by privilege.²

Additional insight into the meaning of the term "statement" can be had by reference to Florida case law interpreting the meaning of that term in substantially analogous provisions of the Florida Rules of Criminal Procedure. Rule 3.220 of the Florida Rules of Criminal Procedure formerly defined a statement precisely as Rule 1.280(b)(3) of the Civil Rules of Procedure defines a statement. In *State v. Latimore*, 284 So.2d 423 (Fla. 3d DCA 1973), the Third District Court of appeal held that "investigation reports which do not quote a person ... directly and never are signed or shown to that person are not statements [as defined by the rule] and thus are not subject to discovery." *Id.* 284 So.2d at 425. In so holding, the *Latimore* court looked not only to the United States Court of Appeals definition of statements but also cited other Florida cases which were in accord with its holding. See *United States v. Graves*, 428 F.2d 196 (5th Cir. 1970); *State v. Gillespie*, 227 So.2d 550 (Fla. 2d DCA 1969); *Darrigo v. State*, 243 So.2d 171 (Fla 2d DCA 1971).

Further support for the definition of the term statement advanced by the JQC in this memorandum can be found in changes that were made to the Florida Rule of Criminal Procedure since the time the cases cited above were decided. In response to these holdings, Florida Rule of Criminal Procedure 3.220 was substantially amended and the definition of "statement" was changed so as to explicitly include police reports and witness interview summaries. The rule

² Because the typed witness interview summaries were prepared by Mr. Butler at the JQC's counsel's instruction, they were prepared for a party in anticipation of litigation and are work product. Additionally, even though a party may be required to provide the names and addresses of individuals who have furnished sworn statements in anticipation of litigation, "absent rare and exceptional circumstances," the party may not be required to furnish the statements themselves because such statements are work product. *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 113 (Fla. 1970); *Hickman v. Taylor*, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947); *Miami Transit Co. v. Hurns*, 46 So.2d 390 (Fla. 1950).

now provides, in pertinent part, “[t]he term ‘statement’ as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording.” Fla. R. Crim. P. Rule 3.220(B). Thus, in sharp contrast to Rule 3.220 of the Florida Rules of Criminal Procedure, the rules which apply to Judicial Qualification Commission proceedings specifically do not define statement so broadly. The only conclusion that can be drawn from this contrast is that the scope of discoverable statements under the Civil Procedure rules, and by extension the Judicial Qualifications Commission rules, does not include summaries of witness interviews.

III. CONCLUSION

Contrary to Judge Albritton’s arguments, typed summaries of witness interviews are not “written statements” under Florida Judicial Qualifications Commission Rule 12(b). Accordingly, the JQC has no obligation to produce these documents and is wholly within its rights to refuse to do so.

For the foregoing reasons, Judge Albritton’s motion should be denied.

Respectfully Submitted,

David T. Knight, Esquire
Florida Bar No.: 181830
Brian L. Josias, Esquire
Florida Bar No.: 893811
HILL, WARD & HENDERSON, P.A.
Post Office Box 2231
Tampa, Florida 33601
(813) 221-3900 (Telephone)
(813) 221-2900 (Facsimile)

Special Counsel for the Florida Judicial
Qualifications Commission

and

Thomas C. MacDonald, Jr., Esquire
Florida Bar No. 049318
1904 Holly Lane
Tampa, Florida 33629
(813) 254-9871 (Telephone)
(813) 258-6265 (Facsimile)

General Counsel for the Florida Judicial
Qualifications Commission

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this ____ day of December, 2005 to:

Scott K. Tozian, Esquire
Smith, Tozian & Hinkle, P.A.
109 North Brush Street, Suite 200
Tampa, Florida 33602
Attorney for Judge Albritton

John Beranek
Counsel to the Hearing Panel
Ausley & McMullen
Post Office Box 391
Tallahassee, Florida 32302

Brooke Kennerly
Florida Judicial Qualifications Commission
1110 Thomasville Road
Tallahassee, Florida 32303

Judge James R. Wolf,
Chairman, Hearing Panel
Florida Judicial Qualifications Commission
1110 Thomasville Road
Tallahassee, Florida 32303

DAVID T. KNIGHT

Special Counsel